FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 26 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. ~~980~~ 30

LAWRASON RIGGS, JR., Special Guardian,

Petitioner,

—*against*—

GIOVANNI DEL DRAGO, MARCEL DEL DRAGO, BYRON CLARK, JR. as Executor, HAROLD HASTINGS, Special Guardian, CORN. EXCHANGE BANK TRUST CO., as Trustee,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SURROGATE'S COURT OF NEW YORK COUNTY, STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF

JOHN W. DAVIS,
OTIS T. BRADLEY,
ANDREW Y. ROGERS,
Counsel for Petitioner.

INDEX

	PAGE
Petition	1
Summary Statement of Matter Involved	2
The Question Presented	6
Jurisdiction of This Court to Grant Certiorari	6
The Reasons for the Allowance of the Writ	7
Prayer	12
Brief	15
Opinions Below, Jurisdiction, etc.	15
POINT I. The Federal Estate Tax Law does not finally determine the incidence of the tax imposed; on the contrary it expressly leaves this to be determined by the states in the exercise of their power to control the estates of their decedents	16
POINT II. If the Federal Estate Tax Law is construed as silent or incomplete as to the ultimate incidence of the Federal tax, or even as definitely fixing for the purpose of the Federal statute the incidence of the tax, section 124 of the Decedent Estate Law is not repugnant to the supremacy or uniformity clauses of the Federal Constitution	18
POINT III. Section 124 of the Decedent Estate Law is valid as applied to the estate of Josephine del Drago where it does no more than impose a condition on her privilege of making a will	20
Conclusion	21
Appendix	22

TABLE OF CITATIONS

PAGE

CASES

Alexander v. Alexandria, 5 Cranch. 1 16
Amoskeag Trust Co. v. Dartmouth College, 89 N. H. 471, 200 Atl. 786 ..... 8, 17

Matter of Bergdorf, 206 N. Y. 309, 99 N. E. 714 20
Brown's Estate v. Hoge, 198 Iowa 373, 199 N. W. 320 17
Burnet v. Guggenheim, 288 U. S. 280 12

Corbin v. Townshend, 92 Conn. 501, 103 Atl. 647 17

Matter of del Drago, 175 Misc. 489, 23 N. Y. Supp. (2d) 943 ..... 4, 15
Matter of del Drago, 287 N. Y. 61, 38 N. E. (2d) 131 . 4, 15

Edwards v. Slocum, 287 Fed. 651 (C. C. A. 2d), aff'd 264 U. S. 61 ..... 9, 10, 16

Gaede v. Carroll, 114 N. J. Eq. 524, 169 Atl. 172 8
Graves v. Schmidlapp, cert. granted October 27, 1941, 314 U. S. —— 6

Haggar Co. v. Helvering, 308 U. S. 389 12
Henderson v. Usher, 125 Fla. 709, 170 So. 846 8
Matter of Hamlin, 226 N. Y. 407, 124 N. E. 4 cert. denied 250 U. S. 672 18
Hepburn v. Winthrop, 83 F. (2d) 566 (App. D. C.) .. 17
Heyenfeldt v. Daney Gold & Silver Min. Co., 93 U. S. 634 12

Irving Trust Co. v. Day, U. S. January 5, 1942 ..... 19, 20, 21

Kelly v. Washington, 302 U. S. 1 ..... 11, 19

PAGE

McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33 6

Peacock v. Pratt, 121 Fed. 772 (C. C. A. 9th) 19
People v. Northern Trust Co., 289 Ill. 475, 124 N. E. 662 17
Phillips v. Commissioner, 283 U. S. 589 12
Plummer v. Coler, 178 U. S. 115 19
Plunkett v. Old Colony Trust Co., 233 Mass. 471, 124 N. E. 265 17

Reid v. Colorado, 187 U. S. 137 19

Salomon v. State Tax Commission, 278 U. S. 484 6
Sinnot v. Davenport, 22 How. 227 19

Thompson v. Kentucky, 209 U. S. 340 19
Thompson v. Union Mercantile Trust Co., 164 Ark. 411, 262 S. W. 324 8

United States v. Snyder, 149 U. S. 210 19

Y. M. C. A. v. Davis, 264 U. S. 47 10

STATUTES

	PAGE
Revenue Act of 1924 (43 Stat. 25) §303(a)(3)	10
Revenue Act of 1926, as amended in 1932 (47 Stat. 282) §303(a)(3)	24
Revenue Act of 1926 (44 Stat. 79) §314	24
Internal Revenue Code (26 U. S. C.):	
Section 812(d)	11, 16, 24
Section 826(a)	17, 24-25
Section 826(b)	4, 16, 17, 25
Section 826(c)	16, 25
Judicial Code, Section 237(b), 28 U. S. C. §344(b)	6
Judicial Code, Section 240(c), 28 U. S. C. §350	6
New York Civil Practice Act, Section 588(3)	4
New York Decedent Estate Law, Section 124 (Chapter 710 of the Laws of 1930)	1, 3-9, 11, 18, 20-22
Purdon's Pa. Stat. Ann. 20 P. S. §844	8

United States Constitution	
Article I, Section 8	1, 3, 5, 11, 12, 19, 20
Article VI	1, 3, 5, 11, 19
New York Constitution	
Article VI, Section 7(3)	4

U. S. Treasury Regulations 68, Article 44 (1925)	10
H. R. Rep. No. 708, 72nd Congress, 1st Sess. (1932)	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

LAWRASON RIGGS, JR., Special Guardian,
Petitioner,

—against—

GIOVANNI DEL DRAGO, MARCEL DEL DRAGO, BYRON CLARK, JR. as Executor, HAROLD HASTINGS, Special Guardian, CORN EXCHANGE BANK TRUST CO., as Trustee,
Respondents.

No.

PETITION FOR A WRIT OF CERTIORARI TO THE SURROGATE'S COURT OF NEW YORK COUNTY, STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

LAWRASON RIGGS, JR. as Special Guardian petitions for a writ of certiorari to review a decision of the Court of Appeals of the State of New York which determined Section 124 of the New York Decedent Estate Law to be invalid upon the ground of repugnancy to the Federal Estate Tax Law and to the supremacy and uniformity clauses of the Constitution of the United States.

Section 124 of the New York Decedent Estate Law (Chapter 710 of the Laws of 1930 set forth in the appendix) provides in substance that whenever it appears upon an executor's or other fiduciary's accounting that such executor or other fiduciary has paid a federal estate tax upon or with respect to any property required to be included

in the gross estate of the decedent under the Federal Estate Tax Law, the amount of the tax so paid, except where a testator otherwise directs in his will, shall be equitably prorated among all the persons sharing in such taxable estate.

SUMMARY STATEMENT OF MATTER INVOLVED.

Josephine del Drago died October 8, 1937, a resident of the County and State of New York, leaving a will dated March 27, 1934, which was admitted to probate by the Surrogate's Court of New York County on April 6, 1938, and letters testamentary were duly issued by that court (R. 25).

At her death Josephine del Drago was possessed of an estate of upwards of $1,000,000. By her will she provided general legacies both outright and in trust and created a residuary trust of the balance. Her will contained no direction with respect to estate taxes or their payment (R. 29, 75).

Proceedings in the Surrogate's Court of New York County.

On January 31, 1940, the executors commenced a proceeding in the Surrogate's Court of New York County for a judicial settlement of their account (R. 1).

All persons interested in the estate were duly made parties to the proceeding and the petitioner here, Lawrason Riggs, Jr. was appointed special guardian to represent the interests of the infant remaindermen of the residuary trust (R. 1, 2).

The executors' account showed that the executors had paid $230,000 to the Collector of Internal Revenue on account of the federal estate tax assessed against the estate (R. 37). By their petition and account the executors asked the Surrogate to determine whether the amount of the federal estate tax paid should be equitably apportioned among all

persons beneficially interested in the estate pursuant to Section 124 of the New York Decedent Estate Law (R. 28, 36, 37).

Certain of the respondents here, Giovanni del Drago and Marcel del Drago, beneficiaries of an outright general legacy and a general legacy in trust respectively, answered the petition setting forth specific objections to the constitutionality of Section 124 of the Decedent Estate Law and claiming that for this reason no part of the amount of the tax should be apportioned against their general legacies but that the entire amount of the tax should be charged against the residuary trust (R. 38-46).

The petitioner here, Lawrason Riggs, Jr., representing the infant remaindermen of the residuary trust, in his report as special guardian asserted that the amount of the federal tax should be apportioned among all beneficiaries of the estate pursuant to Section 124 and should not be charged entirely against the residuary trust (R. 53).

The chief constitutional ground relied on by the objectants was that Section 124 of the Decedent Estate Law was repugnant to the provisions of the Federal Estate Tax Law* and therefore violated Article VI (the supremacy clause) of the Constitution of the United States. The answers also raised the question of constitutionality under Article I, Section 8 (the uniformity clause) (R. 38-46).**

---

* Title III of the Revenue Act of 1926, as amended and Title II of the Revenue Act of 1932, as amended, under which acts the Federal estate tax on the estate of this decedent was imposed. For convenience, instead of referring to particular sections of the Revenue Act of 1926, as amended, reference will be made to the Internal Revenue Code, the sections of which, relevant to the present controversy, are taken without change from the Revenue Act of 1926, as amended.

** Repugnancy to the Fourteenth Amendment to the Constitution was alleged in the answers but the unconstitutionality of the statute on this ground was not pressed in the Court of Appeals or considered by that court.

The objecting general legatees contended that Congress by enacting an estate tax intended the tax to be borne by the *residuary* estate in every case where the will did not provide to the contrary, that this intention was expressed in Section 826(b) of the Internal Revenue Code (set forth in the appendix) and that the Federal Constitution denied the states power to overrule Congress and shift any part of the tax onto the general legatees.

After a hearing, the constitutional objections of the general legatees to the apportionment of federal taxes were overruled by the Surrogate (*Matter of del Drago*, 175 Misc. 489, 23 N. Y. Supp. (2d) 943) (R. 83-88) and decrees dated November 19, 1940 and December 24, 1940 were duly made and entered accordingly in the Surrogate's Court of New York County (R. 8-24).

Proceedings in the New York Court of Appeals.

From these decrees of the Surrogate's Court of New York County, the general legatees, Giovanni del Drago and Marcel del Drago, as authorized by the New York Constitution and Practice Act, appealed directly to the New York Court of Appeals on the ground that the only question involved on the appeal was the validity of a state statute under the Constitution of the United States (Section 588(3) of the New York Civil Practice Act and Article VI, Section 7(3) of the New York Constitution) (R. 4-7).

The Court of Appeals on November 27, 1941 in a four-to-three decision reversed the determination of the Surrogate on the ground that Section 124 of the Decedent Estate Law was unconstitutional (*Matter of del Drago*, 287 N. Y. 61, 38 N. E. (2d) 131) (R. 91-110).

The Grounds Upon Which the Court of Appeals Determined Section 124 of the New York Decedent Estate Law To Be Unconstitutional.

The majority of the Court of Appeals construed the Federal Estate Tax Law, and Section 826(b) of the Internal

Revenue Code in particular, as placing the ultimate incidence of the tax upon the *net residuary* estate. Having so construed the Federal Estate Tax Law, it determined that the New York statute requiring, in the absence of a provision in the will directing otherwise, proration of the amount of the Federal tax was repugnant to the Federal Estate Tax Law and to so much of Article VI of the Federal Constitution as provides that the laws of the United States shall be the supreme law of the land.

The majority also held that even though Congress may have failed to fix the incidence of the tax completely, a state may not constitutionally supplement such omissions in the federal act.

Finally the Court determined that there could be no uniform operation of the Federal estate tax if each state determined for itself how the burden of the tax should be borne, and for this reason held Section 124 of the Decedent Estate Law to be repugnant to so much of Article I of the Federal Constitution as provides that federal excises shall be uniform throughout the United States.

Proceedings Subsequent to the Determination by the Court of Appeals.

On January 19, 1942 the petitioner here moved for reargument in the Court of Appeals. This motion was denied on January 22, 1942 (R. 111, 112). On the same date this petitioner moved that the order of remittitur of the Court of Appeals be amended to set forth the grounds of the decision. This motion was also denied on January 22, 1942 upon the ground that the Court's opinions showed that upon the appeal a federal question was presented and necessarily passed upon (R. 112, 113).

On February 16, 1942 an order was made by the Surrogate's Court upon the remittitur of the Court of Appeals (R. 113-117).

THE QUESTION PRESENTED.

The question is whether Section 124 of the Decedent Estate Law is repugnant to the Federal Estate Tax Law and violates the supremacy or uniformity clauses of the Federal Constitution.

JURISDICTION OF THIS COURT TO GRANT CERTIORARI.

The petition for certiorari is made pursuant to 28 U. S. C. §344(b).

The Court of Appeals, the highest court of the State of New York, has held Section 124 of the New York Decedent Estate Law unconstitutional as repugnant to the Federal Estate Tax Law and to the Constitution of the United States (R. 91-110).

The validity of the state statute was properly drawn in question by answer in the Surrogate's Court of New York County, the court of first instance (R. 38-46), and properly preserved and raised by the taking of a direct appeal and by the notice of appeal to the Court of Appeals (R. 4-6).

The record in this case has been remitted by the Court of Appeals to the Surrogate's Court of New York County.

An order has been entered in the Surrogate's Court of New York County upon the remittitur of the Court of Appeals finally determining the incidence of the Federal estate taxes so far as this estate and the persons interested therein are concerned (R. 113-117).

The petition properly requests that the writ be directed to the Surrogate's Court of New York County. *Graves* v. *Schmidlapp*, cert. granted October 27, 1941, 314 U. S. ——; *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33; *Salomon* v. *State Tax Commission*, 278 U. S. 484.

This application is made within the three months allowed by 28 U. S. C. §350, having been made not only within three

months from the date of the order on remittitur made on February 16, 1942 and the denial of the motion for reargument on January 28, 1942, but within three months from the date of the order of the Court of Appeals on November 27, 1941.

THE REASONS FOR THE ALLOWANCE OF THE WRIT.

1. *The Court of Appeals has decided an important question of Federal law which should be finally settled by this Court.*

This Court has never been called on hitherto to determine the constitutionality of a state statute legislating as to the final incidence of the Federal estate tax.

Section 124 providing that except where the will otherwise directs, the amount of the Federal estate tax after it is paid by the executor shall be equitably apportioned among all persons interested in the taxable estate in accordance with their respective benefits, has been a part of the Decedent Estate Law of New York for eleven years. Pursuant thereto the Federal estate tax has been apportioned by New York courts in the judicial settlements of thousands of estates. By the increase in tax rates* and in types and varieties of interests includible in the gross taxable estate, that which was of comparatively lesser moment in estate administration in 1916, and even in 1930, has become a matter of dominant importance in 1942.

---

* For example:

Net Taxable Estate	*Tax Under 1916 Federal Estate Tax Law*	*Tax Under Present Federal Estate Tax Law*
$ 100,000	$ 1,500	$ 20,380*
1,000,000	41,000	290,260*
10,000,000	841,000	5,014,520*

* After maximum credit allowed for state inheritance taxes.

Petitioner believes that it may fairly be said that there are hundreds of instances of estates now in the process of administration in New York State alone which are seriously affected by this decision. The immediate effect of the decision on many such estates in the process of administration is chaotic. Testators, whose wills are now in the process of administration, had sought under the guide set up in Section 124 to secure for the natural objects of their bounty certain portions of whatever property they might have to pass along. In many instances these carefully made plans will be wrecked if the decision stands.

There are many persons now living whose wills have been drawn in the light of Section 124, and who will not or cannot in the natural course of human conduct make the changes rendered necessary by this decision to preserve their actual wishes. Their testamentary schemes are jeopardized or destroyed by the decision.

Pennsylvania has a statute similar to Section 124 of the New York Decedent Estate Law (Purdon's Pa. Stat. Ann. 20 P. S. §844). Petitioner understands that, by reason of the decision of the Court of Appeals, the constitutionality of this statute is now being contested (*Estate of Jennie King Mellon*, Orphan's Court, Allegheny County, Pennsylvania and *Estate of R. Wistar Harvey*, Orphan's Court, Philadelphia County, Pennsylvania).

The result of this determination by the Court of Appeals is not only to render the New York statute invalid. It puts directly in question the power of other state legislatures to deal with the final burden of the Federal tax.

The judiciary of many states also have assumed the right to deal locally with the incidence of the Federal tax. *Amoskeag Trust Co.* v. *Dartmouth College*, 89 N. H. 471, 200 Atl. 786 (and cases therein cited); *Gaede* v. *Carroll*, 114 N. J. Eq. 524, 169 Atl. 172, *Henderson* v. *Usher*, 125 Fla. 709, 170 So. 846; *Thompson* v. *Union & Mercantile Trust Co.*, 164 Ark. 411, 262 S. W. 324.

Until a determination of the issue here presented is made by this Court serious doubts will exist as to the power of a state either by its courts or by its legislature to treat the question of the final incidence of the Federal tax after the tax has been paid.

2. ***The Court of Appeals has adopted a construction of the Federal Estate Tax Law contrary to the expressed intention of Congress and contrary to the construction placed upon that law by the Department of Justice, the Treasury Department, the Circuit Court of Appeals for the Second Circuit and this Court.***

In drafting Section 124 of the Decedent Estate Law, the Commission to Investigate Defects in the Laws of Estates (see Combined Reports of Commission, Reprint Edition, p. 338, set forth as an historical note in 13 McKinney's Consolidated Laws of New York, p. 420) specifically relied upon the language of the Circuit Court of Appeals in *Edwards v. Slocum*, 287 Fed. 651 (C. C. A. 2d, Judge Hough writing), aff'd 264 U. S. 61 (involving the method of determining the amount of charitable deductions under the Federal Estate Tax Law) that:

> "So far as the words of this statute are concerned, the United States does not care who ultimately bear the weight of this tax: it announces the sum and demands payment from the executors; if the legatees and devisees cannot agree as to the burden bearing, the state courts can settle the matter. * * *"

Eminent counsel for the Department of Justice representing the Treasury Department expressly stated in their brief on appeal to this Court in the *Slocum* case that this proposition of the Circuit Court of Appeals as enunciated by Judge Hough was "fundamental and conceded." This Court

clearly recognized that this was the position taken by the representatives of the Department of Justice and Treasury Department and seemingly expressed its approval of and adopted Judge Hough's proposition in the opinion of Mr. Justice Holmes affirming *Edwards* v. *Slocum* (264 U. S. 61, 63) and in Chief Justice Taft's opinion in *Y. M. C. A.* v. *Davis*, 264 U. S. 47, 51, decided on the same date and argued with the *Slocum* case.

This firm position taken by the government was accepted by Congress as representing the correct construction of the Federal Estate Tax Law when, in 1924, as a direct result of the *Slocum* case and shortly after the case was decided, the Federal Estate Tax Law was amended as to the method of computing charitable deductions (Revenue Act of 1924, §303(a)(3)).

This amendment recognized in express terms that the final incidence of this tax or of any estate succession legacy or inheritance taxes might be determined either "by the terms of the will" or "by the law of the jurisdiction under which the estate is administered" or "by the law of the jurisdiction imposing the particular tax".

The phrase "by the law of the jurisdiction under which the estate is administered" is alone decisive of this case.

Conforming with Judge Hough's proposition that the United States was not interested after it had collected its tax, Congress made no attempt here to direct by which one of these methods the final incidence of the Federal estate tax was to determined. U. S. Treasury Regulations 68, Article 44 (1925), interpreting this amendment, read in part:

> " • • • if a residuary estate, or a portion thereof, be bequeathed to charity, *and by the local law* the Federal estate tax is payable out of the residuary estate, the deduction may not exceed that portion of the residuary

estate bequeathed to charity as reduced by the Federal estate tax. * * * " (Italics supplied.)

This portion of the regulation is meaningless unless it is to be read in conformity with the position taken by counsel for the Government and Judge Hough's opinion that the final incidence of the Federal tax is a matter of local law.

The Revenue Act of 1926 did not originally contain this provision of the 1924 Act, but in 1932 it was amended so as to include it (47 Stat. 282). (See H. R. Rep. No. 708, 72d Congress, 1st Sess. (1932) pp. 49-50.) It is now Section 812(d) of the Internal Revenue Code (26 U. S. C. §812(d)) without change (set forth in appendix).

3. ***The Court of Appeals in determining the state statute to be violative of the supremacy and uniformity clauses of the Federal Constitution has determined a Federal question in a way in conflict with applicable decisions of this Court.***

Section 124 of the Decedent Estate Law does not in any way interfere with the power to "lay" or "collect" the Federal Estate Tax (U. S. Constitution, Article I, Section 8, subdivision 1). It expressly refers to a situation where there is a pending accounting and the estate fiduciary "has paid" the tax and is accounting, as fiduciary, to the state courts. It was carefully designed by a commission composed of members of wide experience in these matters so as not to interfere with or to become operative until the tax is collected, the fiduciary has his receipted tax bill and the federal purpose has been fulfilled.

This Court has frequently said that the repugnancy or conflict between the Federal and state acts must be so direct and positive that the two cannot be reconciled or consistently stand together. *Kelly* v. *Washington*, 302 U. S.

1, 10. It has been held by this Court that variations in incidence of Federal taxes by operation of state law do not infringe the constitutional requirement of geographical uniformity. *Phillips* v. *Commissioner*, 283 U. S. 589, 602.

4. ***The Court of Appeals in adopting a construction of the Federal statute which leads to absurd, harsh and unnecessary results disregarded this Court's settled principles of statutory construction.***

It is absurd to construe the Federal law as placing the incidence of the tax upon the *residuary* estate when the Federal government can have not the slightest concern as to whether a testator's residuary beneficiaries, as contrasted with his specific pecuniary beneficiaries, shall bear the entire burden of the tax if the will happens to be silent; and when in many instances there will be no residue.

It is a harsh construction because, contrary to the declared policy of the State of New York, it places the final burden entirely upon those whom the State believes the testator, silent on the subject, would naturally intend to be the objects of his bounty.

It is an unnecessary construction because it is in no way relevant to the purpose of the act and does not affect the amount or collection of the Federal tax. By its terms, the apportionment provided by the state law does not become effective until the tax has been paid and the estate has been closed so far as the Federal government is concerned.

This Court has held that a construction leading to such results is to be avoided. *Haggar Co.* v. *Helvering*, 308 U. S. 389, 394; *Burnet* v. *Guggenheim*, 288 U. S. 280, 285; *Heydenfeldt* v. *Dancy Gold & Silver Min. Co.*, 93 U. S. 634, 638.

Prayer.

For the foregoing reasons, your petitioner prays that a writ of certiorari issue out of this Court to the Surrogate's Court

of New York County, commanding that Court to certify and send to this Court on a day to be determined a full and complete transcript of the record of all of the proceedings of such Court had in this case, to the end that this cause may be reviewed and determined by this Court; that the order of the Court of Appeals of the State of New York and the order of the Surrogate's Court of New York County entered on the remittitur of the Court of Appeals be reversed; and that petitioner be granted such other and further relief as may be proper.

Lawrason Riggs, Jr. as
Special Guardian of the
Children of Mario del Drago

By JOHN W. DAVIS
OTIS T. BRADLEY
ANDREW Y. ROGERS
His Counsel

Dated, New York, N. Y., February 25, 1942.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

LAWRASON RIGGS, JR., Special Guardian,
Petitioner,
—*against*—
GIOVANNI DEL DRAGO, MARCEL DEL DRAGO, BYRON CLARK, JR. as Executor, HAROLD HASTINGS, Special Guardian, CORN EXCHANGE BANK TRUST CO., as Trustee,
Respondents.
No.

BRIEF IN SUPPORT OF PETITION

Opinions Below.

The opinion of Surrogate Foley is reported in 175 Misc. 489, 23 N. Y. Supp. (2d) 943 and appears at R. 83-87; the opinion of the Court of Appeals and dissent therefrom are reported in 287 N. Y. 61, 38 N. E. (2d) 131 and appear at R. 91-110.

Jurisdiction.

A statement as to jurisdiction appears in the petition pages 6-7 above.

Statement of the Case.

A summary statement of the facts is given in the petition pages 2-5 above.

Statutes Involved.

The statutes involved are set forth in an appendix attached to the brief.

POINT I.

The Federal Estate Tax Law does not finally determine the incidence of the tax imposed; on the contrary it expressly leaves this to be determined by the states in the exercise of their power to control the estates of their decedents.

We know of no Federal case which holds or even declares by way of dictum to the contrary of the succinct statement of Judge Hough concurred in as indicated above (Petition p. 9) by the Treasury Department, the Department of Justice, Congress and this Court that: "So far as the words of this statute are concerned, the United States does not care who ultimately bear the weight of this tax: it announces the sum and demands payment from the executors; if the legatees and devisees cannot agree on the burden bearing, the state courts can settle the matter."

Section 812(d) and the circumstances under which it was adopted constitute a direction to the courts to so expound the provisions of the Federal Estate Tax Law. *Alexander* v. *Alexandria*, 5 Cranch. 1, 7-8.

In reaching a contrary construction, the Court of Appeals relied principally on Section 826(b) of the Internal Revenue Code (set forth in the appendix).

Section 826(b) was originally enacted in 1916 without detailed discussion as a part of the first federal estate tax act. It has been continued without change in succeeding revenue laws. Two years later Section 826(c) of the Internal Revenue Code was enacted (also set forth in the appendix).

Fairly construed, Section 826(b) means no more than that if some person other than the executor pays the tax, as he may well be compelled to do under the Federal law, such person is not to be foreclosed from an equitable con-

tribution from those who may be equally liable pursuant to state law for the payment of the tax. In providing in Section 826(a) for the collection by the federal authorities of the tax from persons other than the executor, Congress in Section 826(b) hastened to add however that it was the purpose and intent of Congress that the tax should be paid out of the estate before its distribution in so far as was practical to do so and unless the will otherwise directed. We should suppose it clear that Congress by thus in effect describing the treatment which, in the absence of a contrary direction by will, *any* claim or expense of administration would receive—i.e., payment out of the estate before distribution so far as practicable—indicated its intent *not* to interfere in the determination of the final incidence of the tax any more than it would in determining the final incidence of any other debts or claims, that being the province of State law.

The provision for the executor paying the tax before *any* distribution would result normally in its falling mathematically, under State law, as do debts and administration expenses, upon the residuary estate. *Hepburn* v. *Winthrop*, 83 F. (2d) 566 (App. D. C.); *Amoskeag Trust Co.* v. *Dartmouth College*, 89 N. H. 471, 200 Atl. 786; *Plunkett* v. *Old Colony Trust Co.*, 233 Mass. 471, 124 N. E. 265; *People* v. *Northern Trust Co.*, 289 Ill. 475, 124 N. E. 662; *Brown's Estate* v. *Hoge*, 198 Iowa 373, 199 N. W. 320; *Corbin* v. *Townshend*, 92 Conn. 501,103 Atl. 647. But that constitutes no command or expression of intention by Congress immutably fixing its incidence upon the residuary estate to the exclusion of any State legislation or judicial decision in respect thereof.

POINT II.

If the Federal Estate Tax Law is construed as silent or incomplete as to the ultimate incidence of the Federal tax, or even as definitely fixing for the purpose of the Federal statute the incidence of the tax, Section 124 of the Decedent Estate Law is not repugnant to the supremacy or uniformity clauses of the Federal Constitution.

The Federal estate tax which the law requires the executor to pay is a tax imposed on an aggregate and artificial estate. Mathematically the actual testamentary estate may be insufficient to bear the total Federal estate tax because of the addition to it of non-testamentary property or it may be so reduced by the payment of that tax that there are insufficient assets or even no assets remaining to satisfy the specific and general legacies bequests and devises, let alone leave anything for residuary legatees.

Prior to 1930 in New York the *judicial* policy of the State was that the Federal estate tax in respect not only of property passing under a will but also of all other property included in the gross taxable estate (except insurance), was payable finally out of the residuary estate unless the will contained a contrary direction (*Matter of Hamlin*, 226 N. Y. 407, 124 N. E. 4, cert. denied 250 U. S. 672).

Section 124 of the Decedent Estate Law enacted the *legislative* policy of the State. What it did was to change the emphasis—that is, to require apportionment as among all sharers (generally speaking) in what was the taxable estate unless the testator directed to the contrary. It assumed to protect what experience had shown to be those whom the testator preferred unless and to the extent only that the testator willed affirmatively to the contrary. This was a particular protection where large outside amounts

were brought into the taxable estate. (See Combined Reports of the Commission to Investigate Defects in the Laws of Estates, Reprint Edition, p. 388. This portion of the report is set forth as an historical note in 13 McKinney's Consolidated Laws of New York, p. 420.)

A state exercising its conceded power to control the estates of its decedents, will of necessity affect the same persons and property as will be affected by the levy and collection of the Federal tax. But as long as the state does not impose any real or actual restraint upon the fulfilment of the purpose of the federal taxing power (contrast *United States* v. *Snyder*, 149 U. S. 210), there can be no violation of the supremacy clause of the Federal Constitution.

That New York has the power to control the estates of its decedents has been reaffirmed only this year. *Irving Trust Co.* v. *Day*, U. S. , January 5, 1942.* To deny the state the power to exercise control over what remains of the estate after Federal taxes have been paid is required by no principle of constitutional law.

There is here no real repugnancy to the exercise of the Federal power and no obvious and appreciable injury. *Plummer* v. *Coler*, 178 U. S. 115, 137, 138; *Sinnot* v. *Davenport*, 22 How. 227, 243; *Kelly* v. *Washington*, 302 U. S. 1, 9, 10; *Reid* v. *Colorado*, 187 U. S. 137, 148; *Thompson* v. *Kentucky*, 209 U. S. 340, 348.

The requirement in the United States Constitution that Federal excise taxes shall be uniform throughout the United States would not appear to be a proper ground for holding state statutes to be unconstitutional, *Peacock* v. *Pratt*, 121 Fed. 772 (C. C. A. 9th). And the Federal statute construed so as to permit the states to determine the final in-

---

* *Irving Trust Co.* v. *Day*, which has a direct bearing on the case at bar (*post* p. 20) was decided after the decision of the Court of Appeals on November 27, 1941.

cidence of tax would not infringe upon the constitutional prohibitions against delegation of the taxing power or the requirement of geographical uniformity. *Phillips* v. *Commissioner*, 283 U. S. 589, 602.

POINT III.

Section 124 of the Decedent Estate Law is valid as applied to the estate of Josephine del Drago where it does no more than impose a condition on her privilege of making a will.

Whatever meaning is placed upon Section 826(b) of the Internal Revenue Code, it specifically leaves the determination of the incidence of the tax to the testator's will. So also does Section 812(d). A will can have no force or meaning except as it is construed, regulated and affected by applicable state law upon which it depends for its existence. *Irving Trust Co.* v. *Day*, U. S. , January 5, 1942; *Matter of Bergdorf*, 206 N. Y. 309, 316, 99 N. E. 714, 717.

Consequently, by necessary implication, Congress has left unimpaired the authority of the states to determine the final incidence of the tax already paid to it through their power to impose a condition on the privilege of making a will.

Leaving the control of the privilege of making a will unhampered in this respect would interfere in no way with the amount or the collection of the Federal tax since no question would arise with respect thereto until after the tax had been paid. Having in mind that one of the avowed Congressional purposes in enacting an estate rather than a succession tax was to obviate the necessity of the federal government's determining the force or meaning of wills, it cannot reasonably be said that Congress intended to deprive the states of their normal powers in this respect over the wills of their decedents.

In *Irving Trust Co.* v. *Day*, this Court has taken occasion this year to reaffirm the fundamental proposition that the power of testamentary disposition is within the states' control and that the exercise of the testamentary privilege with a statutory condition attached will impose the consequences of that condition on the testator and his estate.

There can be no conflict between the Federal Estate Tax Law which in express terms permits the testator to direct the incidence of the Federal tax by will and Section 124 of the New York Decedent Estate Law which provides as a condition to the privilege of making a will that the testator shall be deemed in the absence of a contrary provision by him to have intended proration of Federal estate taxes as though such a clause were embodied in his will.

CONCLUSION.

This case involves matters of novel impression and first importance which should be reviewed by this Court, and a writ of certiorari should issue for that purpose as prayed in the foregoing petition.

Respectfully submitted,

JOHN W. DAVIS,
OTIS T. BRADLEY,
ANDREW Y. ROGERS,
Counsel for Petitioner.

Dated, New York, N. Y., February 25, 1942.

APPENDIX

The Statutes Involved

Section 124 of the New York Decedent Estate Law (Laws of 1930, c. 709):

"§124. Apportionment of federal and state estate taxes; executor or administrator to deduct taxes from distributive shares.

1. Whenever it appears upon any accounting, or in any appropriate action or proceeding, that an executor, administrator, temporary administrator, trustee or other person acting in a fiduciary capacity, has paid a death tax levied or assessed under the provisions of article ten-c of the tax law, or under the provisions of the United States revenue act of nineteen hundred twenty-six, as amended by the United States revenue act of nineteen hundred twenty-eight, or under any death tax law of the United States hereafter enacted, upon or with respect to any property required to be included in the gross estate of a decedent under the provisions of any such law, the amount of the tax so paid, except in a case where a testator otherwise directs in his will,* shall be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues. Such proration shall be made by the surrogate in the proportion, as near as may be, that the value of the property, interest or benefit of each such person bears to the total value of the property, interests and benefits received by all such persons interested in the estate, except that in making such proration allowances shall be made for any exemptions granted by the act imposing the tax and for any deductions allowed by such act for the purpose of arriving at the value of the net estate; and except that

* The only amendment to section 124 since its enactment in 1930 has been the addition in 1940 of a second exception clause, "and except in a case where by written instrument executed inter vivos direction is given for apportionment within the fund of taxes assessed upon the specific fund dealt with in such inter vivos instrument." Laws of 1940, c. 829, §13.

in cases where a trust is created, or other provision made whereby any person is given an interest in income, or an estate for years, or for life, or other temporary interest in any property or fund, the tax on both such temporary interest and on the remainder thereafter shall be charged against and be paid out of the corpus of such property or fund without apportionment between remainders and temporary estates. For the purposes of this section the term 'persons interested in the estate' shall have the same meaning with respect to both state and federal taxes as is given it by section two hundred forty-nine-m of the tax law.

So far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid by the executor as such out of the estate before its distribution. In all cases in which any property required to be included in the gross estate does not come into the possession of the executor as such, he shall be entitled, and it shall be his duty, to recover from whomever is in possession, or from the persons interested in the estate, the proportionate amount of such tax payable by the persons interested in the estate with which such persons interested in the estate are chargeable under the provisions of this section, and the surrogate may by order direct the payment of such amount of tax by such persons to the executor.

No executor, administrator or other person acting in a fiduciary capacity shall be required to transfer, pay over or distribute any fund or property with respect to which a federal or state estate tax is imposed until the amount of such tax or taxes due from the devisee, legatee, distributee or other person to whom such property is transferred is paid, or, if the apportionment of tax has not been determined, adequate security is furnished by the transferee for such payment.

2. The surrogate, upon making a determination as provided in subdivision one of this section, shall make a decree or order directing the executor or other fiduciary to charge the prorated amounts against the persons against whom the tax has been so prorated in so far as he is in possession of property or interests of such persons against whom such charge may be made

and summarily directing all other persons against whom the tax has been so prorated or who are in possession of property or interests of such persons to make payment of such prorated amounts to such executor or other fiduciary.

3. This section shall not apply to estates of persons dying prior to September first, nineteen hundred thirty.".

Section 812(d) of the Internal Revenue Code (26 U. S. C. §812 (d)) (derived from Section 303 (a) (3) of Title III of the Revenue Act of 1926, as amended in 1932 (47 Stat. 282), without change).

Section 812 provides that for the purpose of the tax the value of the net estate shall be determined by deducting from the value of the gross estate:

"(d) *Transfers for public, charitable, and religious uses.* The amount of all bequests, legacies, devises, or transfers * * * to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes * * *. If the tax imposed by section 810, or any estate, succession, legacy, or inheritance taxes, are, either by the terms of the will, by the law of the jurisdiction under which the estate is administered, or by the law of the jurisdiction imposing the particular tax, payable in whole or in part out of the bequests, legacies, or devises otherwise deductible under this paragraph, then the amount deductible under this paragraph shall be the amount of such bequests, legacies, or devises reduced by the amount of such taxes. The amount of the deduction under this subsection for any transfer shall not exceed the value of the transferred property required to be included in the gross estate. (53 Stat. 123.)"

Section 826 of the Internal Revenue Code (26 U. S. C. §826) (derived from Section 314 of Title III of the Revenue Act of 1926 (44 Stat. 79) without change):

"§826. *Collection of unpaid tax*—(a) *Sale of property.* If the tax herein imposed is not paid on or be-

fore the due date thereof the collector shall, upon instruction from the Commissioner, proceed to collect the tax under the provisions of general law; or appropriate proceedings may be commenced in any court of the United States having jurisdiction, in the name of the United States, to subject the property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto. This subsection in so far as it applies to the collection of a deficiency shall be subject to the provisions of sections 871 and 891.

(b) *Reimbursement out of estate.* If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

(c) *Liability of life insurance beneficiaries.* If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio. (53 Stat. 127.)"